Nos. 84-518 and 84-710

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

ROBERT W. JOHNSON, et al.
Petitioners

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, et al.
Respondents

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner

v.

MAYOR AND CITY COUNCIL OF BALTIMORE, et al.
Respondents

On Writs of Certiorari
To the United States Court of Appeals
for the Fourth Circuit

BRIEF OF AMICUS CURIAE STATE OF VERMONT

JEFFREY L. AMESTOY
Attorney General
State of Vermont

J. WALLACE MALLEY, JR.
Asst. Attorney General
109 State Street
Montpelier, Vermont 05602
(802)828-3171

Table of Contents

Table of Authorities

Statutes

I.

INTEREST OF AMICUS CURIAE

As Chief Justice Burger noted in his dissenting opinion in E.E.O.C. v. Wyoming , 460 U.S. 226, 253, (1983) (Burger, Ch.J., dissenting), more than half of the states have retirement laws which may run afoul of the Age Discrimination in Employment Act, 29 U.S.C. §621 et seq . (hereinafter the "ADEA"). The State of Vermont is one such state by virtue of its statute requiring state police officers to retire at age 55. 3 V.S.A. §459 (a)(2).

Currently, Vermont is a defendant in two suits in which individual retired police officers have challenged the validity of the retirement law under the ADEA. Several others have threatened suit, and the United States Equal Employment Opportunity Commission

(E.E.O.C.) has advised that it may file suit at any time.

The State of Vermont feels that its retirement law is valid since age is a "bona fide occuational qualification" (B.F.O.Q.) within the meaning of that term in the ADEA. Vermont's age limitation is both a practical and reliable means of assuring that its officers are physically able to perform the often demanding and strenuous duties of police work. However, the costs of defending the current and threatened suits, each of which will involve several medical experts, will prove exceedingly burdensome to a small, rural state such as Vermont.

The State believes that the Court's decision in the present action will have a dramatic effect on whether Vermont and hundreds of other states and municipalities will have to litigate the

BFOQ issue repeatedly in order to protect their ability to staff their police and firefighting forces with persons who are capable of handling severe stress and exertion.

II.

SUMMARY OF ARGUMENT

The Court of Appeals below recognized that Congress had intended to permit discrimination based on age in those limited circumstances in which age could be established as a BFOQ. The Court correctly held that Congress itself had recognized age as a BFOQ for police and firefighters when it required that its own police and firefighters retire at age 55. 5 U.S.C. §8335(b). Adoption by this Court of the Fourth Circuit's rationale would put an end to the current undesireable phenomenon, where the BFOQ issue for law enforcement

officers and firefighters is being needlessly litigated over and over in hundreds of different cases nationwide. Not unexpectedly, the proliferation of litigation has left the states and municipalities with no clear guidance as to the legality of their retirement laws. One court upholds an age-50 retirement for all state police officers; another invalidates an age-65 retirement for fire chiefs only; and a third invalidates an age-65 retirement for all liquor control enforcement officers. Compare Mahoney v. Trabucco, 738 F.2d 35 (1st Cir. 1984) with E.E.O.C. v. City of St. Paul, 671 F.2d 1162 (8th Cir. 1982) and E.E.O.C. v. Pennsylvania Liquor Control Board, 565 F.Supp. 520 (E.D.Pa. 1983).

The State of Vermont believes that the Fourth Circuit's analysis is the correct one. However, should this Court

wish to apply some other test, then it should adopt an analysis similar to that used in the equal protection cases. See e.g. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976). Such a test would recognize that where the public safety is at stake, the states and municipalities should be accorded a measure of discretion and their retirement laws sustained so long as they can demonstrate a rational basis for their decisons.

III.

ARGUMENT

A. This Court Should Eliminate Current Inequities in the Interpretation of the ADEA by other lower courts, and Adopt the Rationale of the Court of Appeals Below.

Prior to the Fourth Circuit's decision in the present case, the states and municipalities were faced with an

ADEA with few guidelines on the BFOQ defense. While generally forbidding age discrimination against persons who are between 40 and 70, the ADEA carved out an exception

> where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

29 U.S.C. §623(f)(1).

Absent further guidance from Congress on just what this exception meant, many of the federal circuits came to adopt what has since become known as the "Tamiami Test". E.g. Usery v. Tamiami Trail Tours, Inc. , 531 F.2d 224, 235-6 (5th Cir. 1976); Orzel v. City of Wauwatosa Fire Dept. 697 F.2d 743, 753 (7th Cir. 1983); Arritt v. Grisell , 567 F.2d 1267, 1271 (4th Cir. 1977); E.E.O.C. v. County of Allegheny , 705 F.2d 679 (3d Cir.

1983). Under this test an employer must show that the age qualification is "reasonably related to the 'essential operation' of its business, and must demonstrate, either that there is a factual basis for believing that all or substantially all persons above the age limit would be unable to effectively perform the duties of the job or that it is impossible or impracticable to determine job fitness on an individualized basis." Orzel , supra, 697 F.2d at 753 (emphasis original).

Nearly every court that has applied this test has viewed it as imposing a very high standard on the employer. The trial judge in the present case described the Tamiami test as placing a "substantial" burden on the City of Baltimore. Similarly, Chief Justice Burger has described it as a "high standard". E.E.O.C. v. Wyoming ,

supra. In commenting on the burden it placed on the City of Baltimore in this case, the Chief Justice went on to observe:

> Given the state of modern medicine, it is virtually impossible to prove that all persons within a class are unable to perform a particular job or that it is impossible to test employees on an individualized basis. See, e.g. Johnson v. Mayor and City Council of Baltimore, 515 F.Supp. 1287, 1299 (D. Md. 1981), cert. denied, 455 U.S. 944.

Id. (emphasis added).

After many years of litigation wherein the Tamiami test was utilized by judges and juries, a confusing patchwork of decisions has emerged which, while giving some hope to the states and municipalities, has left lingering doubts as to whether or not police officers and firefighters can lawfully be retired at any age below 70.

For example, most of the early cases, particularly at the trial level,

seemed to indicate that it was exceedingly difficult, if not impossible, to prove a BFOQ. Johnson v. Mayor and City Council of Baltimore, 515 F.Supp. 1287 (D.Md. 1981) cert. denied, 455 U.S. 944 (1982); E.E.O.C. v. Missouri State Highway Patrol, 555 F.Supp. 97 (W.D. Mo. 1982) (The court struck down an age-60 retirement for the highway patrol and held that a patrolman's functional, not chronological, age was controlling); E.E.O.C. v. Pennsylvania Liquor Control Board, supra (Court invalidated an age-65 retirment for liquor control enforcement officers); E.E.O.C. v. County of Los Angeles, 706 F.2d 1039 (9th Cir. 1983) (County failed to prove BFOQ for a maximum hiring age of 35 for sheriff's and fire departments). However, some of these same cases were later reversed on appeal on factual or legal grounds. E.g. Johnson v. Mayor

and City Council of Baltimore , 731 F.2d 209 (4th Cir. 1984): E.E.O.C. v. Missouri State Highway Patrol , 748 F.2d 447 (8th Cir. 1984); Mahoney v. Trabucco , 738 F.2d 35 (1st Cir. 1984). Later BFOQ defenses began to get a better reception at the trial level. E.E.O.C. v. Commonwealth of Pennsylvania , 596 F.Supp. 1333 (M.D. Pa. 1984) (BFOQ found for age-60 retirement of the state police); E.E.O.C. v. Wyoming , Civil No. C80-0036 (D.Wyo. November, 1983), (Jury found BFOQ after remand from U.S. Supreme Court); E.E.O.C. v. City of St. Paul, supra.

Today, seven years after the ADEA was made applicable to the states and their political subdivisions, the scales have tipped in favor of the BFOQ defense for police and firefighters, but the harshness of the Tamiami test still

leaves lingering doubts as to how a particular judge or jury might view the case. And despite the seven years of precedent, the states must still litigate each and every case on the merits in order to be sustained in a BFOQ defense. Because of the lingering uncertainties, the states and towns are still left wondering if their retirement plans are valid or not, and are faced with the very distinct possibility that an age 55 retirement for police could be held valid in one state but invalid just across the border in another state.

Apparently doubting that Congress could have intended such an absurd result, the Court of Appeals in this case noted that Congress had already established a BFOQ when it required its own federal law enforcement officers and firefighters to retire at age 55. 5 U.S.C. §8335(b). Recognizing that the

federal retirement plan was motivated by a need, identical to Baltimore's, to insure that firefighters were capable of handling sustained physical exertion, the Court of Appeals correctly held that age 55 was also a BFOQ for Baltimore's firefighters.

The State of Vermont respectfully urges this Court to adopt the Fourth Circuit's rationale. Such a ruling would put an end to the uncertainty which has plagued the scores states, cities, and towns, who have searched for a workable resolution to retirement disputes and who have already spent hundreds of thousands of dollars on litigation in a vain effort to obtain a definitive answer. The Fourth Circuit's analysis removes the danger that a retirement age could be upheld in one jurisdiction, while being struck down in another. But most importantly, it would

recognize for all governmental bodies what Congress has already affirmed on the federal level--that in matters pertaining to police and firefighters the public safety demands that age be deemed a BFOQ.

B. If the Court Believes that the ADEA Requires a BFOQ Determination on a Case-by-Case Basis, then it Should Reject the Lopsided Tamiami Test and Adopt a Rational Basis Analysis.

Unlike many other circuits which have addressed the issue, the Fourth Circuit did not examine the specific facts bearing on the BFOQ defense. Therefore, should this Court reject the Fourth Circuit's legal analysis, an issue remains as to whether the trial court correctly applied the facts to the law.

As has already been noted, the trial judge applied the Tamiami test in a manner which made it exceedingly dif-

ficult, if not "impossible" for Baltimore to succeed in its BFOQ defense. The State of Vermont believes that since the Tamiami test imposes a burden far more severe than Congress intended, that test should now be rejected and a different test, consistent with the ADEA, be imposed.

In Usery v. Tamiami Trail Tours, Inc., supra, the Fifth Circuit disclosed that it had derived its now landmark test not from the ADEA itself, but rather from two sex discrimination cases. The first prong of the test (whether the age qualification reasonably relates to the essential operation of the business) arose from Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir. 1971). In Diaz the Court rejected Pan Am's policy of refusing to hire male cabin attendants, because they were supposedly not as well equipped to

deal with the psychological needs of passengers as were females. The Court reasoned that discrimination based on sex could be justified only where the essence of the business would be undermined by the failure to hire members of one sex exclusively. Since the essence of Pan Am's business was safety, and not the psychological needs of passengers, the court refused to sanction the discriminatory hiring policy.

The second prong of the Tamiami test (a factual basis that all or substantially all persons above the age limit would be unable effectively to perform the job, or that it would be impossible or impracticable to determine fitness on an individualized basis) was derived from Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969). In Weeks the company had refused to hire women for a

job which occasionally required the lifting of objects weighing 30 lbs. or more. The court ruled that in order to sustain a Title VII BFOQ defense in this instance, the employer would have to prove that he had a factual basis for concluding that all, or substantially all, women could not perform safely and efficiently the duties of the job involved. Id. at 235. The remainder of the second prong of the Tamiami test was contained in a footnote in Weeks. Id. at 255, n.5.

While these standards may have been appropriate in those sex discrimination cases, there is no basis for automatically applying them to age discrimination cases under the ADEA. One critical distinction between these two types of discrimination is that classifications based on sex have enjoyed considerably more protection from the courts than age

classifications have ever received. This Court has recognized that women have suffered a "... long and unfortunate history of sex discrimination," and that they still face "... pervasive ... discrimination in our educational systems, in the job market, and ... in the political arena." Frontiero v. Richardson , 411 U.S. 677, 684, 686. (1973). Women, therefore, fall just short of a "suspect" class. By contrast, this Court easily rejected "suspect" class status for the aged, and more specifically the class of all Massachusetts highway patrolmen over age 50, when it stated:

> [A] suspect class is one 'saddled with such disabilites, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.' While the treatment of the aged in this Nation has not been wholly free of discrimination, such persons ... have not experienced a 'history of purposeful unequal

> treatment ' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities ... [O]ld age does not define a 'discrete and insular' group, [cite omitted] in need of 'extraordinary protection from the majoritarian political process.' Instead, it marks a stage that each of us will reach if we live out our normal span.

Massachusetts Board of Retirement v. Murgia , 427 U.S. 307, 313, 314 (1976)(emphasis added).

The Tamiami court therefore extrapolated an oppressively strict two-prong standard from the highly protected area of sex discrimination and summarily superimposed that standard on an age discrimination case without any statutory or judicial authority for doing so.

An examination of the language of the ADEA itself reveals the overreaching of the Tamiami court. The ADEA sets forth in plain language an uncomplicated test. An age qualification is valid :

> where age is a bona fide occupational qualification reasonably

> necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age.

29 U.S.C. §623(f)(1)(emphasis added).

The ADEA makes no mention of "essential" operations. It mentions only "normal" operations. It gives not the slightest hint that a factual basis must exist which proves that "all or substantially all" persons above the specified age must be unable to perform the duties of the job. Instead, it sets forth in plain English the rather mundane requirement that the age classification must only be "reasonably necessary" to the normal operation of the business. Nor is there any hint in the ADEA that an employer must show that it would be "impossible or impracticable" to determine fitness on an individualized basis. Simply stated, the ADEA's BFOQ exception requires the

employer to act reasonably and responsibly, nothing more and nothing less.

In discussing the degree of intrusion offered by the ADEA into traditional state functions, this Court has already indicated that the " ... States' discretion ... [is] merely being tested against a reasonable federal standard." E.E.O.C. v. Wyoming, supra , 460 U.S. at 240. Again, the ADEA itself suggests only a standard of reasonableness, not a "virtually impossible" test as Tamiami has been described by the Chief Justice. E.E.O.C. v. Wyoming , supra, (Burger, Ch.J., dissenting).

Should this Court find it necessary to review the facts of this case against a BFOQ standard, the State of Vermont respectfully requests that the unduly burdensome Tamiami test be rejected, and that the Court apply the plain and

unadorned language of §623(f)(1). Since the language of this section suggests nothing more than a test of reasonableness, the BFOQ defense could be evaluated in much the same manner as this court applied the "rational basis" test in Massachusetts Board of Retirement v. Murgia, supra . If it was obectively reasonable for the City of Baltimore to have concluded that an age-55 retirement was necessary to assure that its firefighters were physically capable of enduring the rigors of firefighting, then Baltimore's retirement law should be upheld. As in Murgia , it would matter not that the age-55 classification was less than perfect, or that some other age could also have been chosen. It would suffice that Baltimore had been able to demonstrate that it had acted reasonably and responsibly in imposing the retirement age.

An application of a rational basis test, at least in the case of police and firefighters, would also have the effect of reconciling the Age Act with Congress' decision to retire federal police and firefighters at age-55. It would enable states and municipalities to make the same judgments as did Congress, that, when public safety is at stake, it is permissible to impose reasonable restrictions on the maximum ages of law enforcement officers and firefighters.

CONCLUSION

The rationale of the Court of Appeals should either be affirmed in its entirety, or this Honorable Court should apply a BFOQ test based upon reasonableness, which would accord to the states and municipalities a substantial measure of discretion in determining what is reasonably necessary to insure the public safety.

Respectfully submitted,

Jeffrey L. Amestoy,
Attorney General

J. Wallace Malley, Jr.
Asst. Attorney General

Attorneys for Amicus Curiae
State of Vermont

March 28, 1985